

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE**

24 HOUR FITNESS USA, INC.

and

Case 20-CA-035419

ALTON J. SANDERS, an Individual

*Carmen Leon and Richard J. McPalmer, Attys.,
for the Acting General Counsel.*

*Marshall Babson, Atty., (Seyfarth Shaw LLP), of
New York, New York; Garry G. Mathiason, Atty.,
(Littler Mendelson, P.C.) of San Francisco, California;
and Daniel L. Nash, Atty., (Akin Gump Strauss Hauer
& Feld), of Washington, DC, for the Respondent.*

*Cliff Palefsky, Atty., (McGuinn, Hillsman, & Palefsky),
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Michael Rubin and Caroline P. Cincotta, Attys., (Altshuler
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on the post-hearing brief.*

*Willis J. Goldsmith and Kristina A. Yost, Attys., (Jones Day), of
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Center, Washington, DC, submitted a brief amicus curiae
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of America in support of 24 Hour Fitness USA, Inc.*

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at San Francisco, California, on June 28, 2012. The unfair labor practice charge, filed by Alton J. Sanders (Sanders), an individual, on February 15, 2011, alleges that 24 Hour Fitness USA, Inc. (Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA). On April 30, 2012, the Regional Director for Region 20 of the National Labor Relations Board (Board or NLRB) issued a formal complaint alleging that Respondent violated

Section 8(a)(1) by maintaining and enforcing a provision in the arbitration policy, contained in its employee handbook, that requires employees to forego any rights they have to the resolution of employment-related disputes by collective or class action (the class action ban). The complaint also alleges that Respondent violated Section 8(a)(1) by asserting the class action ban in the 10(b) period in eight specific cases brought against it by employees. The Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged and interposing a variety of affirmative defenses, including a claim the Board lacked a quorum when it decided a case critical to the outcome here due to the expiration of the term of one of the Board Members.

Having now carefully considered the entire record, including the demeanor of the witnesses and the reliability of their testimony, together with the arguments set forth in the extensive briefs filed on behalf of the Acting General Counsel (AGC), the Respondent, and the Charging Party as well as the briefs amicus curiae filed by the Service Employees International Union (SEIU) and the Chamber of Commerce of the United States of America (Chamber), I find that Respondent violated the Act as alleged based on the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, operates fitness centers in seventeen different states, including a facility in San Ramon, California. During the calendar year ending December 31, 2011, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000. During the same period, Respondent purchased and received, at its San Ramon facility, products, goods, and services valued in excess of \$5,000 directly from points outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Pleadings and the Basic Arguments about the Merits

The complaint alleges that in the 6-month period preceding the filing of the charge Respondent enforced the provisions in its employee handbook that requires employees to “forego any rights they have to the resolution of employment-related disputes by collective or class action.” In that same period, the complaint alleges that Respondent initiated legal actions in eight separate cases pending in both State and Federal courts seeking to enforce the unlawful terms of its arbitration policy.

¹ On May 18, 2012, Associate Chief Judge Cracraft granted the Service Employees International Union (SEIU) motion to intervene but limited the degree of the SEIU’s participation to that of “an amicus curiae in briefing to the administrative law judge and to the Board.” In an order issued September 10, 2012, I likewise granted the request of the Chamber to appear as amicus curiae to file a brief in support of Respondent’s position.

Respondent’s answer admits that it “has maintained and enforced” employee handbook policies, including its arbitration policy, but denies that its arbitration policy violates the Act. Respondent also denies that it violated the Act by taking the certain legal actions to enforce the class action ban contained in its arbitration policy in the eight specific cases cited in the complaint, as well as three others identified in a hearing stipulation.

The AGC, the Charging Party, and the SEIU contend that *D.R. Horton*, 357 NLRB No. 184 (2012), controls the outcome here. (AGC Br., p. 1). They argue that employees have a right under Section 7 to engage in collective or class activities when seeking to resolve disputes with their employer about their wages, hours, and other terms and conditions of employment and, hence, the ban on those particular activities contained in Respondent’s arbitration policy unlawfully interferes with employee Section 7 rights within the meaning of Section 8(a)(1).²

Respondent disputes the controlling effect of *Horton* on the facts present here. Instead, Respondent and the Chamber argue that the opt-out feature of its arbitration policy, described in more detail below, establishes that the waiver of collective or class action is voluntary on the part of the employee, thereby making this case fundamentally distinguishable from *Horton*. They argue that *Horton* applies only to arbitration agreements containing a class action ban that are a mandatory condition of employment. Because the employees here have the opportunity to opt-out of Respondent’s arbitration policy completely, the policy cannot be fairly characterized as mandatory. Hence, as Respondent’s policy is not mandatory, they argue, *Horton* does not apply.

B. Relevant Facts

The Company, which commenced operations in the early 1980s, currently operates more than four-hundred membership fitness clubs scattered across 17 states. Charging Party Sanders submitted an application for work at the Company on August 25, 2008, and commenced working on October 6. He remained employed at the Company for approximately 2 years as a group exercise instructor providing instruction primarily in yoga and spinning. During his tenure, he worked at Company facilities in Larkspur, Santa Rosa, Petaluma, and Fairfield, California.

The three-page employment application that Sanders submitted in August 2008 contained an “Applicant’s Certification” that included the following:

I understand that as an expeditious and economical way to settle employment disputes without need to go through courts, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration. I understand that I may opt out of the arbitration procedure, within a specified period of time, as the procedure provides. 24 Hour Fitness and I also understand that if I am offered employment and I do not opt out, we both will submit

² In pertinent part, Sec. 7 of the Act protects the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*” (Emphasis added.) Sec. 8(a)(1) provides that it is an unfair labor practice for an employer to “interfere with, restrain, or coerce” employees in the exercise of their Sec. 7 rights.

exclusively to final and binding arbitration all disputes arising out of or relating to my employment. This means a neutral arbitrator, rather than a court or jury, will decide the dispute. (R. Exh. 1, p. 3).

- 5 No evidence establishes that Sanders sought or was provided with any information at that time concerning the opt-out procedures.

Later in October 2008, when he commenced working for the Company, Sanders went through the typical “on-boarding” process required of all employees. At that time, he received a
10 copy of the 2007 Team Member Handbook (employee handbook) and a copy of the “New Team Member Handbook Receipt Acknowledgement (handbook receipt form). He was requested to sign and return the handbook receipt form to the Company, which he did. The handbook receipt form included the following statement:

15 **I have received the 2007 Handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this Handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the ‘Arbitration of Disputes’ policy, I will submit it exclusively to binding and final arbitration**
20 **according to its terms, unless I elect to opt out of the ‘Arbitration of Disputes’ policy as set forth below.**

I understand that I may opt out of the ‘Arbitration of Disputes’ policy by signing the Arbitration of Disputes Opt-Out Form (‘Opt-Out Form’) and returning it
25 **through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this Handbook, as determined by the Company’s record. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3263. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the ‘Arbitration of Disputes’**
30 **policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me. (G.C. Exh. 2)**
(Emphasis in original.)

35 Concededly, Sanders did not opt-out of the Respondent’s arbitration policy. When he later learned of a race and sex discrimination case another employee brought against the Company and sought to join in the case, he was informed that he would have to proceed individually.

As noted, the process that Sanders encountered when he began employment with the Respondent is typical. All new employees receive a copy (or access to a copy) of the
40 Respondent’s sixty-plus page handbook usually on their first day of work. The handbook contains a description of various work policies. For example, the initial section headed “our employment relationship” in the 2010 edition of the handbook contains provisions related to the Respondent’s open door policy, the at-will nature of the employment relationship, its policies concerning equal employment opportunity and accommodations for disabilities, its policy
45 against harassment, discrimination and retaliation, its policy regarding the arbitration of disputes (the provision at issue here), policies regarding conflicts of interest and non-fraternization, and its policies regarding confidentiality, proprietary information, trademarks, and copyrights. Other

sections of the handbook contain detailed provisions about workplace conduct, health, security and safety, employee development, compensation and benefits to name only a few. Each new employee is also given a copy of the handbook receipt form designed to acknowledge receipt of the handbook and is requested to sign it. Employees who decline to sign the receipt form are told that the policies described in the handbook will, nonetheless, apply to them. Both the handbook and the handbook receipt form have gone through several revisions in the last decade.

The Respondent first instituted its unilaterally devised arbitration policy for resolving employment-related disputes that it imposed as a condition of employment more than a decade ago. Since that time Respondent has fervently promoted its arbitration policy in documents distributed to employees. The heart of Respondent’s arbitration policy has always provided that “any employment-related dispute between a Team Member and 24 Hour Fitness” must be submitted to final and binding arbitration. All versions of the Company’s arbitration policy since 2005 have provided explicitly that nothing in the policy “shall be deemed to preclude a Team Member from filing or maintaining a charge with the Equal Employment Opportunity Commission or the National Labor Relations Board.”

Additionally, the Respondent made another significant modification to its arbitration policy in 2005 by adding language that banned class and other forms of concerted actions. This revised language set forth in the handbook sought to effectively preclude employees from combining their identical or closely related employment disputes against Respondent. The policy adopted in 2005 and retained in various editions of the handbook thereafter provided:

In arbitration, the parties will have the right to conduct civil discovery and bring motions as provided by the Federal Rules of Civil Procedure. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons of the general public.

In addition, Respondent’s revised arbitration policy further limited employee collaboration by including nondisclosure language stating that “[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.” All subsequent editions of the handbook after 2005 retained these restrictions barring concerted employee activity in pursuit of employment-related disputes.

The accompanying handbook receipt containing limited information about the arbitration policy made no reference to these new limitations on concerted activities. Respondent’s practice of applying all of its handbook policies to employees whether or not they signed the handbook receipt effectively made the handbook policies a condition of employment applicable to all current employees immediately and to future employees on their first day of work.

The next revision to Respondent’s arbitration policy occurred in or about January 2007. Although the language of its arbitration policy as set forth in its 2005 handbook remained the same, the Respondent gave each newly-hired employee an opportunity to opt out of the arbitration policy provided the employee did so within the 30-day period following their receipt

of the handbook. Except for its employees working in the State of Texas, none of the employees hired before 2007 were provided with an opportunity to opt out of the arbitration policy.³ As a consequence, those employees remained bound by the arbitration policy in effect when they were originally hired.

The opt-out revision resulted in changes to two employment forms, the application for employment and the handbook receipt. The last paragraph of the employment application form was revised to include a general reference to the new opt-out procedure. It stated only that an employee could “opt out of the arbitration procedure within a specified period of time, as the procedure provides.” It then went on to state that if the applicant chose not to opt-out of the yet undisclosed arbitration policy, it would be binding on both parties.

The new handbook receipt form contained the following language describing the opt-out procedure in detail:

I have received the January 2005 handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the “Arbitration of Disputes” policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the “Arbitration of Disputes” policy as set forth below. I understand that I may opt out of the “Arbitration of Disputes” policy by signing the Arbitration of Disputes Opt-Out Form (“Opt-Out Form”) and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this handbook, as determined by the Company’s records. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the “Arbitration of Disputes” policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me. (Jt. Exh. 5).

In September 2007, Respondent issued a new employee handbook and a new handbook receipt form. The new handbook contained no changes in Respondent’s arbitration policy. The handbook receipt form was revised to reflect that the employee had received the new 2007 handbook rather than the 2005 handbook. The 2010 edition of Respondent’s handbook retained the same arbitration policy language as set forth in the 2007 handbook.

In or about February 2009, Respondent converted its new employee on-boarding process to an electronic system. This new digital system required the new employee to review the new

³ This anomaly as to the Texas employees resulted from a court-mandated agreement in *Carey v. 24 Hour Fitness USA Inc.*, No. 10-03009 (S.D. Tex.). Although the full details are not known, it appears that all of the Respondent’s Texas employees were provided a full written explanation of the arbitration policy and another opportunity to opt out if they so chose. Consequently, Texas employees of the Respondent hired before January 1, 2007, received an opportunity to opt-out by virtue of this special, court-approved procedure.

employee materials, including the 60+ page handbook, at a computer terminal and provide a digital signature where required. All of the materials included a print option that the employee could use to obtain a copy for her or his personal records. A separate series of screens dealt with the terms of the arbitration policy and the opt-out process. After completing the electronic on-boarding process, employees always had access to an electronic version of the handbook at any location though their electronic employee account.

The 2009 digital version of the employee handbook receipt retained the same notice providing that employees who declined to sign would nonetheless be bound by all policies set forth in the handbook. This digital version of the arbitration policy in the employee handbook contained three added paragraphs that had not previously appeared in the hardcopy versions of the handbook. Those added paragraphs stated:

I agree that if there is a dispute arising out of or related to my employment as described in the Arbitration of Disputes Policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the Arbitration of Disputes Policy as set forth below.

I understand that I may opt out of the Arbitration of Disputes Policy by signing the Arbitration of Disputes Opt-Out Form (“Opt-Out Form”) and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I click on the button below. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the Arbitration of Disputes Policy. I understand that my decision to opt out or not opt out will not be used as a basis for 24 Hour Fitness taking any retaliatory action against me.

I UNDERSTAND THAT BY ENTERING MY INITIALS AND CLICKING THE “CLICK TO ACCEPT” BUTTON, I AM AGREEING TO THE ARBITRATION OF DISPUTES POLICY (WHICH INCLUDES MY ABILITY TO OPT-OUT OF THE POLICY WITHIN THE PERIOD OF TIME NOTED ABOVE). I ALSO AGREE THAT THIS ELECTRONIC COMMUNICATION SATISFIES ANY LEGAL REQUIREMENT THAT SUCH COMMUNICATION BE IN WRITING.

Employees who successfully pursued the opt-out alternative received a simple form to sign, date and return. The current form, sans the signature and other identity lines, reads as follows:⁴

⁴ The Respondent modified the opt-out notices and its internal procedures for handling opt-out requests in 2010 when it shifted responsibility for handling and dealing with opt-out inquiries from its human resources to its legal department. The new opt-out information sheet instructed employees interested in the process to contact a paralegal with that responsibility rather than the employee hotline connected with its human resources department.

DISPUTE RESOLUTION AGREEMENT
OPT-OUT FORM

By signing and dating below, I am choosing to opt-out of the 24 Hour Fitness' Dispute Resolution Agreement ("Agreement"). I understand that by opting out, I will not participate in or be bound by the alternative dispute resolution procedures described in the Agreement.

* * *

IN ORDER TO OPT-OUT OF THE DISPUTE RESOLUTION AGREEMENT, YOU MUST SIGN AND RETURN THIS FORM TO THE LEGAL DEPARTMENT THROUGH INTEROFFICE MAIL OR BY FAX TO 925-543-3358, NO LATER THAN 30 CALENDAR DAYS AFTER DATE OF HIRE.

The Respondent's brief argues that the next to last sentence of the above quoted paragraph establishes that the arbitration policy is inoperative until the 30-day opt out period expires. (R. Br., p. 9) Deborah Lauber, Respondent's vice president and corporate counsel, explained that this bifurcated opt-out procedure was adopted to minimize the potential for retaliation or adverse inferences that might result if local managers knew of an employee's opt-out decision. In addition, she said, the procedure provided the employee with the opportunity to reflect on that "important decision."

In the week before the hearing, the Respondent employed 20,563 "Team Members" to serve the more than three million members of its clubs. It admits that 19,614 are employees within the meaning of Section 2(3). Of that number, 3,605 were hired prior to January 1, 2007, when the opt-out aspect of its arbitration policy became effective. Based on Respondent's review of approximately 20,000 personnel files "out of a universe of approximately 70,000 files," the parties stipulated that "no fewer and no more than 70 Section 2(3) employees" successfully opted out of the Respondent's arbitration policy. The number of pre-2007 Texas employees who opted out under the special agreement in the *Carey* case is unknown.

Since August 15, 2010 (the last day of the 10(b) period), Respondent has sought in several court cases to enforce the class action ban aspect of its arbitration policy, including the *Carey* case previously mentioned. Respondent acknowledges that it took action to enforce the class action ban in the following cases alleged in complaint paragraph 5:

(1) *Fulcher v. 24 Hour Fitness USA, Inc.*, No. RG 10524911 (Alameda County Superior Court, Cal.), a class action case initiated by former employee Raoul Fulcher and other named plaintiffs containing causes of action brought individually and on behalf of others similarly situated for (1) Race, Color, National Origin Discrimination (California Fair Employment and Housing Act, Government Code Section 12940, et seq., "FEHA"), (2) Gender Discrimination (FEHA), and (3) Violations of the California Unfair Competition Law, Business & Professions Code Sections 1700, et seq., ("UCL"). On October 22, 2010, Respondent filed a motion to compel individual arbitration under the terms of the Arbitration Policy. On March 29, 2011, the court granted the motion, in part ordering the plaintiffs to submit their individual claims for monetary relief to binding

arbitration pursuant to the terms of the Arbitration Policy. However, the court retained jurisdiction over the plaintiffs' claims for declaratory and injunctive relief. On January 17, 2012, the court denied Respondent's motion to compel arbitration of plaintiffs' claims for declaratory and injunctive relief. On January 27, 2012, Respondent appealed the court's January 17 ruling.

(2) *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-715 SC (N.D. Cal.), a class action brought by former employee Gabe Beauperthuy and other named plaintiffs (current and former employees of Respondent) who had worked (or were working) in 11 states in various capacities as managers, sales counselors, and trainers as well as others similarly situated alleging violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* On February 21, 2006, Respondent filed a motion to dismiss the complaint based on the failure to state a claim upon which relief can be granted (FRCP 12(b)(6)) or, in the alternative, for a more definite statement (FRCP 12(e)), because the plaintiffs had agreed to the Arbitration Policy. On February 21, 2006, Respondent filed a Motion to Dismiss. On April 11, 2006, the court denied Respondent's motion to dismiss, but granted the motion for a more definite statement. On November 28, 2006, the Court issued an order that Respondent had waived its right to compel arbitration. On February 24, 2011, the court granted Respondent's motion to decertify the class. The court has retained jurisdiction over the plaintiffs' claims.⁵

(3) *Lee v. 24 Hour Fitness USA, Inc.*, No. 11-22700 (S.D. Fla.), a class action brought by a former employee Jeanlin Lee and other named plaintiffs on behalf of themselves and others similarly situated alleging FLSA violations. On September 6, 2011, Respondent filed a motion to compel individual arbitration and to stay proceedings pending arbitration based in part on the Arbitration Policy. On October 18, 2011, the court granted Respondent's motion to compel arbitration pursuant to the terms of the Arbitration Policy and granted Respondent's motion to stay proceedings pending arbitration. The court has retained jurisdiction over this case.

(4) *Constanza v. 24 Hour Fitness USA, Inc.*, No. 11-22694 (S.D. Fla.), a class action brought by a former employee Elio Constanza on behalf of himself and others similarly situated alleging violations of the FLSA. On September 6, 2011, Respondent filed a motion to compel individual arbitration and to stay proceedings pending arbitration based on the Arbitration Policy. On November 1, 2011, the court granted Respondent's motion. The court has retained jurisdiction over this case.

(5) *Carey v. 24 Hour Fitness USA, Inc.*, No. 10-03009 (S.D. Tex.), a class action brought by a former employee John Carey on behalf of himself and others similarly situated

⁵ When the court denied Respondent's 2006 motion to dismiss, it held that Respondent's conduct amounted to a waiver of its right to compel plaintiffs to arbitrate their claims and barred it from any future effort to do so. But when the court granted the Respondent's motion in February 2011 to decertify the various classes previously recognized, it provided the named plaintiffs with the option of arbitrating their individual claims or proceeding before the court.

alleging violations of the FLSA. On October 27, 2010, Respondent filed a motion to stay and to compel individual arbitration based on the Arbitration Policy. On December 1, 2010, the court denied Respondent's motion. On December 13, 2010, Respondent filed an appeal. On January 25, 2012, the United States Court of Appeals for the Fifth Circuit affirmed the court's decision. The District Court has retained jurisdiction allowing plaintiffs to pursue a collective action in court.

(6) *Lewis v. 24 Hour Fitness USA, Inc.*, (Cal.App. 2 Dist. 2011), a class action brought by former employee Kevin Lewis and other named plaintiffs on behalf of themselves and others similarly situated alleging violations of the California Labor Code, Lab. Code §§ 510, 1194(a), 203, 226 (a) , 226(e), 2698(a), 2698(f), and UCL. On July 29, 2010, Respondent filed a motion to compel individual arbitration and stay all civil court proceedings based on the Arbitration Policy. On September 20, 2010, the court denied the motion to compel arbitration. The court has retained jurisdiction over this case. On November 3, 2011, Respondent successfully appealed the denial of its motion. In March 2012, the trial court ruled that the plaintiffs' claim for relief under California's Private Attorney General Act is not subject to arbitration and ordered that claim to proceed while staying the arbitration on the other claims. Respondent has appealed the court's ruling on that matter.

(7) *Dominguez v. 24 Hour Fitness USA, Inc.*, No. BC439206 (Los Angeles County Superior Ct.), a class action brought by former employee Iva Dominguez on behalf of herself and others similarly situated alleging violations of the California Labor Code. On September 16, 2010, Respondent filed a motion to compel individual arbitration and stay all civil court proceedings based on the Arbitration Policy. On December 7, 2010, the court granted Respondent's motion. The court has retained jurisdiction over this case.

(8) *Martinez v. 24 Hour Fitness USA, Inc.*, No. 20-2011-00484316-CU-CE-CXC (Orange County Superior Court), originally brought as a class action by a former employee Max Martinez on behalf of himself and others similarly situated alleging violations of the California Labor Code, Lab. Code §§ 510, 1198, 226.7, 512, 201, et seq., and the UCL. On December 9, 2011, Respondent filed a motion to compel individual arbitration and stay judicial proceedings based on the Arbitration Policy. On January 31, 2012, the court granted Respondent's motion. The court has retained jurisdiction over this case.

In addition to the foregoing proceedings, the parties stipulated that the Respondent sought to enforce the class action ban in other legal proceedings pending as of August 15, 2010, including, but not limited to, the following cases in the California courts:

1) *Rosenloev, et al. v. 24 Hour Fitness USA, Inc.*, Orange County Superior Court Case No. 30-2009-00180140, and *Suppa v. 24 Hour Fitness, USA, Inc.*, Los Angeles County Superior Court Case No. BC42210: The *Suppa* case was transferred and coordinated as a single action with the *Rosenloev* case. Respondent sought to compel individual arbitration. The trial court denied Respondent's motion. Respondent appealed the decision, and the Court of Appeal affirmed the trial court;

2) *Burton v. 24 Hour Fitness USA, Inc.*, Orange County Superior Court, Case No. 30-2007-00031558: Respondent sought to compel individual arbitration. The trial court denied Respondent's motion. Respondent appealed the decision. The Court of Appeal affirmed the trial court; and

3) *Lawler v. 24 Hour Fitness, Inc.*, San Bernardino County Superior Court, Case No. CNDS 1001737: Respondent sought to compel individual arbitration. The trial court granted Respondent's motion.

C. Further Findings and Conclusions

An employer violates Section 8(a)(1) by maintaining work rules that tend to chill employee Section 7 activities. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Rules explicitly restricting Section 7 activities violate Section 8(a)(1). *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). But where a workplace rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. *Id.* at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (DC Cir. 2007).

Relying on these fundamental principles, the Board found the mandatory arbitration agreement in *Horton* violated Section 8(a)(1) because it expressly restricted protected activity by requiring employees to “refrain from bringing collective or class claims *in any forum*.”⁶ 357 NLRB No. 184, slip op. at 5. (Emphasis added). This conclusion is predicated on the conclusion that “*employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.*”⁷ *Id.* at 3. (Emphasis added.) In finding the violation, the Board stated:

⁶ The Board separately found the *Horton* arbitration agreement violated Sec. 8(a)(1) because employees would reasonably interpret it as barring or restricting their right to file charges with the Board. No such claim is made here presumably because Respondent’s arbitration policy specifically provides that it does not preclude the filing charges with the NLRB or the EEOC.

⁷ *Horton* cites three prior Board cases (two of which were enforced in court) and two added court cases decided between 1980 and 2011, for the proposition that the filing of a civil action by employees relating to their wages, hours, and other terms and conditions of employment is activity protected by Section 7. 357 NLRB No. 184, slip op. 2, fn 4. The Supreme Court has reached a similar conclusion. In *Eastex, Inc. v NLRB*, 437 U.S. 556, 565–566 (1978), Justice Powell, writing for the majority, noted “it has been held that the ‘mutual protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” It cited numerous prior Board and lower court decisions with approval. *Id.* at fn. 15. Yet, Respondent explicitly rejects the notion that “the right to engage in class or collective action is a protected, concerted activity under Section 7 of the Act” but provides no convincing rationale. See Resp. Br., p. 30.

We need not and do not mandate class arbitration in order to protect employees’ rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

The Acting General Counsel argues that all renditions of Respondent’s arbitration policy have been incompatible with the first prong of the *Lutheran Heritage Village-Livonia* test since the class action ban in 2007 prohibited employees from pursuing employment-related claims collectively in any forum. But assuming that this arbitration policy does not expressly restrict Section 7 activity, the Acting General Counsel contends that the Respondent has repeatedly applied the class action ban in pending cases in order to restrict collective activity contrary to the second prong of the *Lutheran Heritage Village-Livonia* test. The Acting General Counsel further contends, in effect, that the opt-out provision fixes the removal of Section 7 protections as the default position and puts employees in the position of following a convoluted process to regain their statutory rights. This requirement that employees act affirmatively to secure rights the law already provides, the Acting General Counsel argues, has long been found to be unlawful. In support, the Acting General Counsel cites this rationale in *Horton*:

That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually.

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court upheld the Board’s holding that individual employment contracts that included a clause discouraging, if not forbidding, a discharged employee from presenting his grievance to the employer “through a labor organization or his chosen representatives, or in any way except personally” was unlawful and unenforceable. *Id.* at 360. The Court agreed that the contracts “were a continuing means of thwarting the policy of the Act. *Id.* at 361. “Obviously,” the Court concluded, “employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes.” *Id.* at 364.

Four years later, the Court reaffirmed the principle that employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court held that individual employment contracts predating the certification of a union as the employees’ representative cannot limit the scope of the employer’s duty to bargain with the union. The Supreme Court observed that:

Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act. . . .

Wherever private contracts conflict with [the Board’s] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility.

Id. at 337.

During this same period of time, the Board held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J. H. Stone & Sons*, 33 NLRB 1014 (1941), *enfd.* in relevant part, 125 F.2d 752 (7th Cir. 1942). “The effect of this restriction,” the Board explained, “is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.” Id. at 1023 (footnote omitted). The Seventh Circuit affirmed the Board’s holding, describing the contract clause as a *per se* violation of the Act, even if “entered into without coercion,” because it “obligated [the employee] to bargain individually” and was a “restraint upon collective action.” *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

357 NLRB No. 187, at 4-5.

Respondent seeks to distinguish its arbitration policy from the arbitration agreement in the *Horton* case by claiming that its opt-out opportunity makes the agreement voluntary. It asserts that no violation occurs when employees voluntarily refrain from exercising Section 7 rights. By providing employees with an opt-out opportunity, Respondent argues that it has properly balanced its arbitration policy with the policies contained in the NLRA, the Federal Arbitration Act (FAA), and the Rules Enabling Act. Respondent also argues that by incorporating the Federal Rules of Civil Procedure in its arbitration policy, it has provided an avenue for employees to pursue class action through a permissive joinder of claims under FRCP Rule 20. Even though Respondent explicitly rejects any notion that the right to engage in class or collective action is a protected concerted activity under Section 7, it argues that the Acting General Counsel failed to prove the essential elements of his case for other reasons. On this latter score, Respondent correctly argues that there is no evidence of interference, restraint, or coercion that brought about the Charging Party’s or any other employee’s voluntary decision at the beginning of their employment to forego participation in class or collective actions.

Respondent advances a variety of other claims. First, Respondent asserts that *Horton* “was wrongly decided” because “even an arbitration policy with a class action waiver that is a mandatory condition of employment must be enforced” under the FAA and Supreme Court precedent. Second, Respondent argues that the charge is untimely with respect to employees hired before January 2007 who have not been provided with an opt-out opportunity but, in the event a violation is found as to them, the appropriate remedy would be merely to require that they be provided with the opportunity to opt out of the arbitration policy. Third, Respondent

asserts that its motion to dismiss complaint paragraph 5 should be granted because the NLRB does not have authority to require courts to undo determinations that they have already made and because a retroactive remedy in the case is not appropriate. And fourth, Respondent claims that the NLRB did not have a proper quorum when *Horton* was decided because the term of Board Member Becker (one of the panel participants) had expired when the case was decided.

As counsel for Respondent and the amicus know full well, I lack authority to adjudicate any claims that *Horton* was wrongly decided, or was decided after Member Becker's term expired. Even so, *Horton* compiles statutory declarations and case precedent that date back seven decades that are binding on me. So regardless of the outcome of that case, the precedent it details is clearly binding until overruled.

The most important beginning point in the analysis of the issues presented here is to recognize that this case does not place in question an employer's right to require employees to arbitrate employment-related disputes. For purposes of this decision, I have presumed that employers may do exactly that and, if they do so, they would be entitled to enforce that requirement. But the tedious arguments advanced by Respondent and its amicus ally fail to convince me that the FAA provides employers with a license to unilaterally craft an arbitration requirement in their terms and conditions of employment that serve to sweep away the well recognized statutory rights of employees to act concertedly by bringing legal actions against their employer. Quite plainly, this case presents the altogether different question as to whether an employer may design and enforce an arbitration policy that prevents its workers from acting in concert for their mutual aid and benefit by initiating and prosecuting a good-faith legal action against their employer.

If one accepts Respondent's arguments, the Supreme Court's recent decisions involving the FAA have radically empowered employers to limit employees Section 7 activity. Relatively speaking, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *CompuCredit, v. Greenwood*, 132 S. Ct. 665 (2012), which Respondent cites in support, have little, if anything, to do with arbitration in the context of the employer-employer relationship. In *Concepcion*, the U.S. Supreme Court held FAA's requirement that the courts enforce private arbitration agreements preempted the California Supreme Court's holding in *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (2005), a case where the state court held that arbitration agreements containing class-action waivers in certain consumer contracts of adhesion unenforceable because they operated effectively as exculpatory contract clauses that are contrary to that state's public policy.

Further, *CompuCredit* is essentially a statutory construction case. It arose after lower courts decided to deny the defendant's motion to compel arbitration per a private agreement based on their conclusion that certain statutory language evidenced a congressional intent that claims arising under the Credit Repair Organizations Act (CROA) would not be arbitrable. In its decision, the Supreme Court concluded that the lower courts had misconstrued specific statutory language in CROA that required a consumer rights notice to include the right to "sue" as precluding litigation in an arbitral forum. It concluded that the remedial language elsewhere in CROA did not foreclose the parties from adopting "a reasonable forum-selection clause" that included arbitration and, if they did so, the courts were obliged to enforce parties' agreement under the FAA. 132 S.Ct. at 671-672.

In my judgment, these cases do not address the fundamental question of whether, and to what degree, the FAA may be used as a tool to alter, by way of private “agreements” that are in large measure imposed unilaterally by employers, the fundamental substantive rights of workers established by decades old congressional legislation. There should be no mistake about it that such a conclusion would be a radical departure from the manner in which the NLRA has been applied in the past. Here, the core issue is whether or not the Respondent may restrict the rights of employees to engage in concerted activity long recognized and protected by Section 7. Though instructive with respect the FAA’s standing in the world of general consumer litigation, the arguments Respondent and its amicus ally have fashioned from *Concepcion* and *CompuCredit* would require that the decades old statutory rights of employees be thrown overboard in order to reach the conclusions they advocate.

Employer devised agreements that seek to restrict employees from acting in concert with each other are the *raison d’être* for both the Norris-LaGuardia Act and Section 7 of the NLRA. The congressional findings giving rise to NLRA and Norris-LaGuardia plainly state that these statutes were intended to correct the massive imbalance in bargaining power between the individual worker and his employer. To correct this imbalance, Congress empowered workers to act concertedly for their mutual aid and benefit in the workplace. Thus, the public policy declaration in Section 2 of the Norris-LaGuardia Act passed in 1932 states:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . 29 USC § 102. (Emphasis added)

Similarly, Section 1 of the NLRA states in part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. 29 USC § 151.

Respondent's arbitration policy serves to restore the imbalance between the individual worker and the corporate employer by prohibiting employees from pursuing the resolution of work place disputes with concerted legal actions and by imposing broad nondisclosure requirements.⁸

Essentially, the Respondent and its amicus ally lobby for this administrative tribunal to establish an employer's right to restrict employees, in order to hold a job, from exercising their statutory right to use the full-range of legal remedies generally available to all citizens.

Lafayette Park, supra, requires a determination as to whether Respondent's arbitration policy contains terms that would tend to chill its employees Section 7 activities. On this fundamental question, I find that both the class action ban and the nondisclosure restriction contained in Respondent's arbitration policy unlawfully limit Respondent's employees from exercising their Section 7 right to commence and prosecute employment-related legal actions in concert with other employees,

Respondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action regardless of whether the employee opts to be covered by it or not. For the purposes of worker rights protected by Section 7, the opt-out process designed by the Respondent is an illusion. The requirement that employees must affirmatively act to preserve rights already protected by Section 7 rights through the opt-out process is, as the Acting General Counsel argues, an unlawful burden on the right of employees to engage in collective litigation that may arise in the future. Board precedent establishes that employees may not be required to prospectively trade away their statutory rights. *Ishikawa Gasket American, Inc.*, 337 NLRB 175-176 (2001).

Even if a worker consciously chooses to opt-out and completes the separate process necessary to do so in a timely manner, the Respondent can still effectively prevent concerted employee activity between those who opt out and the vast majority of other employees who (1) consciously chose not to opt-out; (2) unconsciously failed to opt-out in a timely fashion; and (3) were hired before 2007 and thereby not given an opportunity to opt out.⁹ Respondent's arbitration policy limits the assistance the opted-out employee may obtain from fellow workers even in pursuit of their own individual claims. But aside from that, any notion that an opt-out employee can identify others who have opted-out in order to secure their fullest cooperation in a

⁸ I found the claims made in the briefs filed by Respondent and the amicus that *Horton* seeks to alter all manner of rules governing the prosecution of complaints in federal and state courts unconvincing. All *Horton*, and this decision for that matter, seek to protect is the right of employees to *invoke* the ordinary rules that apply to all. Nothing would alter how the courts of any jurisdiction deal with complaints brought before them by Respondent's employees.

⁹ Charging Party and its amicus ally suggested that I essentially conclude the Respondent deliberately designed its initial employment documents in order to, among other things, dupe new employees into being bound by its arbitration policy. Although I am not willing to reach that conclusion based on the limited evidence in this case, I would be startled to learn that the number of employees who made a conscious, fully-informed decision to be bound by Respondent's highly self-serving arbitration policy even came close to the infinitesimal number of employees who actually opted out.

collective action is simply belied by Respondent’s own inability to readily identify other opted out individuals in responding to the Acting General Counsel’s hearing subpoena.

Respondent also argues that its arbitration policy only requires employees to bring their employment-related disputes individually and does nothing to prevent ordinary concerted activities among employees. That assertion is simply far from the case. The nondisclosure requirement in Respondent’s arbitration policy imposes extreme limitations on activities protected by Section 7. The following portion of the Board’s decision in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), illustrates the long history of precedent finding that limitations on employee communications about their wages, hours and working conditions such as those imposed by this nondisclosure policy to be unlawful:

Under Section 7 of the Act, employees have the right to engage in activities for their “mutual aid or protection,” including communicating regarding their terms and conditions of employment.³ It is well established that employees do not lose the protection of the Act if their communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue⁴ as to constitute, for example, “a disparagement or vilification of the employer’s product or reputation.”⁵ For example, the Board has found employees’ communications about their working conditions to be protected when directed to other employees,⁶ an employer’s customers,⁷ its advertisers,⁸ its parent company,⁹ a news reporter,¹⁰ and the public in general.¹¹

³ See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

⁴ Cf. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

⁵ See *Sahara Datsun*, 278 NLRB 1044, 1046 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), quoting *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980).

⁶ In addition to *Waco, Inc.*, 273 NLRB 746 (1984), cited by the judge, see also *Heck’s, Inc.*, 293 NLRB No. 132, slip op. at 23 (May 18, 1989), and *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986).

⁷ *Greenwood Trucking, Inc.*, 283 NLRB 789 (1987).

⁸ *Sacramento Union*, 291 NLRB No. 83 (Oct. 31, 1988), enfd. 899 F.2d 210 (9th Cir. 1989).

⁹ *Oakes Machine Corp.*, 288 NLRB 456 (1988), enfd. 897 F.2d 84 (2d Cir. 1990); *Mitchell Manuals, Inc.*, 280 NLRB 230, 232 fn. 7 (1986).

¹⁰ *Auto Workers Local 980*, 280 NLRB 1378 (1986), enfd. 819 F.2d 1134 (3d Cir. 1987); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

¹¹ *Cincinnati Suburban Press*, 289 NLRB No. 127 (July 20, 1988).

More to the point here, the Board found in *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), that a communication rule providing for the discipline of any employee who disclosed “disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination data for employees who have left the company” to be unlawful on its face. (Emphasis added)

Although the nondisclosure requirement here does not specify the type of the remedial action available where an employee fails to heed its limitations, this lack of specificity permits the inference that Respondent could either resort to disciplinary action or institute a separate legal action for breach of the arbitration policy’s terms. The chilling effect of either option should be obvious. Absent the unlikely consent of Respondent, this non-disclosure provision

could be read by a reasonable employee as requiring the retention of a lawyer just to learn, among other things, whether it would be permissible to openly solicit one's fellow workers: (1) for evidence or service as a witness; (2) for monetary contributions to help pay for the very expensive costs of arbitration; or (3) for the presence of fellow employees at an arbitration proceeding merely for moral support. It also means, of course, that the employee who has gone through the arbitration process under Respondent's policy would be prohibited, again absent Respondent's very unlikely consent, from advising other employees who have like or similar employment disputes whether or not these other employees have opted out of the arbitration policy. Even though Respondent's management would have full access to the detail of prior arbitration decisions, the nondisclosure provision muzzles the employee who did not opt out and who invoked the arbitration process from providing a useful critique of the process, the outcome, or any other worthwhile advice to any fellow worker with a similar dispute whether that employee had opted out or not. This nondisclosure provision vividly illustrates that Respondent, by way of the restrictions in its arbitration policy, seeks to restore the power imbalance between workers and their employers that existed prior to congressional passage of Norris-LaGuardia and the NLRA.¹⁰

For the foregoing reasons, I find Respondent's arbitration policy with its class action ban and its nondisclosure provision amounts to the type of private employment agreement that is unlawful and unenforceable under the NLRA because it severely restricts protected concerted employee activity. By maintaining it as well as enforcing it as to the pending cases described above against individuals who are employees within the meaning of Section 2(3), Respondent has violated, and is continuing to violate, Section 8(a)(1).

CONCLUSIONS OF LAW

¹⁰ Any claims that the nondisclosure provision in Respondent's arbitration policy was not properly plead nor fully litigated lack merit. In defending the class action ban in its arbitration policy, Respondent's arguments encompassed the entirety of its arbitration policy. Apart from Respondent's argument that its arbitration policy lawfully restricts class actions and does not otherwise restrict concerted employee activity, Respondent's defense relies on a variety of other provisions in its arbitration policy. The most striking illustration is found in its unmeritorious claim that FRCP Rule 20, incorporated in its policy by general reference to the FRCP, preserves an avenue for employees to join in a concerted judicial action, thereby satisfying the *Horton* requirement that there be an arbitral or judicial avenue open for collective litigation of employment claims. In as much as Respondent has chosen to cherry-pick provisions throughout its arbitration policy, whether explicitly stated or not, in support its defense, it cannot properly be heard to complain about the scrutiny of its entire policy on the ground that it has not been fully litigated.

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing the arbitration policy contained in its “Team Member Handbook,” Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. Respondent’s conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In accord with the request of the Acting General Counsel, my recommended order will also require Respondent to notify “all judicial and arbitral forums wherein the (arbitration policy) has been enforced that it no longer opposes the seeking of collective or class action type relief.” This will include a requirement that Respondent: (1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at Respondent’s request if a motion to vacate can still be timely filed.

Respondent opposes this added relief. It argues that the Board has no authority to direct a federal or state court, or an arbitration tribunal to modify its own prior orders or awards. In addition, Respondent argues that such retroactive relief is inappropriate.

I find the remedial action sought by the Acting General Counsel is appropriate here. Respondent’s contention concerning the Board’s lack of authority misapprehends the nature of this relief sought and granted. The Acting General Counsel seeks no order or directive that would *require* any federal or state court, or arbitral tribunal to do anything. Instead the relief sought, and which I grant, merely requires Respondent to take action consistent with this decision by notifying any court or arbitral tribunal that have compelled the individual arbitration of claims at the request of Respondent that it is withdrawing such a motion or request and no longer objects to class or collective employment-related claims brought by those of its workers who qualify as employees within the meaning of Section 2(3) of the Act. If the court or tribunal chooses not to honor Respondent’s good-faith request for whatever reason, then so be it. And the same is true with respect to an order requiring Respondent to withdraw any pending motion seeking to prevent Section 2(3) employees from acting collectively.

Respondent’s further assertion that such relief is inappropriate as retroactive in nature also misapprehends the nature of the relief. Any remedial order under Section 10(c) necessarily applies to the past conduct of the employer or labor organization against whom it is issued. An order that applies to a respondent’s own past conduct found unlawful following a hearing conducted in accord with the principles of due process is not the type of order that would be subject to, or require justification under, the principles of retroactive application. My recommended order applies to no other pending case, no other employer, and to no other conduct

than alleged unlawful in this complaint. For these reasons, Respondent’s assertions about retroactive application lack merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, 24 Hour Fitness USA, Inc., San Ramon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining any provision in the arbitration of disputes section of its Team Member Handbook that prohibits its employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

b. Enforcing, or seeking to enforce, any provision in the arbitration of disputes section of its Team Member Handbook that prohibits employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Remove from the arbitration of disputes section of future editions of its Team Member Handbook any prohibition against employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

b. Notify present and future employees individually that the existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment currently contained in the arbitration of disputes section of its Team Member Handbook will be given no effect and that the provision will be removed from subsequent editions of the Team Member Handbook.

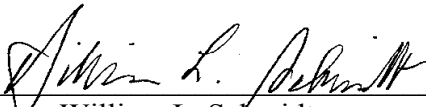
¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

c. Notify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment of its employees since August 15, 2010, that it desires to withdrawal any such motion or request, and that it no longer objects to it employees bringing or participating in such class or collective actions.

d. Within 14 days after service by the Region, post at all of its facilities located in the United States and its territories copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2011.

e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 6, 2012


 William L. Schmidt
 Administrative Law Judge

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law by maintaining and enforcing certain provisions of our Arbitration of Disputes policy contained in our Team Member Handbook and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain any provision in the Arbitration of Disputes section of our Team Member Handbook that prohibits you from bringing or participating in class or collective actions relating to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL NOT enforce, or seek to enforce, any provision in the Arbitration of Disputes section of our Team Member Handbook that prohibits you from bringing or participating in class or collective actions relating to your wages, hours, or other terms and conditions of your employment in any arbitral or judicial forum.

WE WILL NOT prohibit you from disclosing the existence, content, or results of any arbitration conducted under our Arbitration of Disputes policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Federal labor law.

WE WILL remove from the Arbitration of Disputes section of future editions of our Team Member Handbook any prohibition against you from bringing or participating in class or collective actions relates to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL remove from the Arbitration of Disputes section of future editions of our Team Member Handbook any prohibition against you from disclosing the existence, content, or results of any arbitration conducted under that policy

WE WILL notify present and future employees individually that our existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment currently contained in the

Arbitration of Disputes section of our Team Member Handbook will be given no effect and that the provision will be removed from subsequent editions of the Team Member Handbook.

WE WILL notify present and future employees individually that our existing prohibition against disclosing the existence, content, or results of any arbitration conducted under our Arbitration of Disputes policy will be given no effect and that the provision will be removed from subsequent editions of our Team Member Handbook.

WE WILL notify any arbitral or judicial tribunal where we have pursued the enforcement of our prohibition against bringing or participating in class or collective actions that relate to the wages, hours, or other terms and conditions of employment of our employees since August 15, 2010, that we desire to withdrawal any such motion or request, and that WE WILL no longer object to our employees bringing or participating in such class or collective actions.

24 HOUR FITNESS USA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.